



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

7 CRIMINAL WRIT PETITION NO. 2054 OF 2024

GOVIND SHIVAJIARAO GITTE
VERSUS
THE STATE OF MAHARASHTRA

...

Mr. Sudarshan J. Salunke, Advocate for the Petitioner
Mr. V. M. Chate, APP for Respondent State

CORAM : Y. G. KHOBRADE, J.

Dated : 16th December, 2024

PER COURT :-

1. Heard at length Shri Sudarshan Salunke, the learned counsel appearing for the Petitioner. Mr. V. M. Chate, the learned APP waives notice on behalf of the respondent State.

2. By the present Petition, the Petitioner/accused takes exception to the order dated 29.11.2024, passed below Exh.178 in Sessions Case No. 70 of 2014 by the learned Additional Sessions Judge, Ambajogai, District Beed, thereby permitted the prosecution to call material witness i.e. handwriting expert to prove hand written suicide note which was seized during course of the investigation by the Investigating Officer and was deposited alongwith charge-sheet with Muddemal property of the Court but inadvertently said suicide note was remained to be referred during the course of trial.

3. The issue arises for consideration that, whether the permitting of the prosecution to lead further evidence to prove suicidal note after evidence is closed by the prosecution and after recording statements of the witnesses u/s 313 of Cri. P. C., will amount to amount to filling up lacuna by the prosecution ?

4. Shri Sudarshan Salunke, the learned counsel appearing for the Petitioner vehemently canvassed that, the Petitioner has been charge-sheeted for the offence punishable under section 306 read with Section 34 of the Indian Penal Code in Crime No. 21 of 2014 registered with the Police Station Ambajogai (City). After framing of charge, the prosecution examined all the witnesses. On 22.02.2024, the prosecution has filed Pursis Exh.174 and closed evidence. Thereafter, on 27.02.2024, the statement of the accused is recorded under section 313 of the Criminal Procedure Code. Thereafter, the matter was heard on 28.02.2024. Subsequently, the matter was adjourned on 3/4 dates for compliance of the order of submitting citation/case laws. However, on 20.03.2024, the prosecution has filed Exh. 178 an application under Section 311 of Criminal Procedure Code and prayed for permission to recall the material witness/handwriting expert on

ground that though the purported document was not in custody of the prosecution/ I.O., but at the fag end of the trial, the prosecution wanted to prove suicidal note of the deceased, when the matter was posted for judgment. However, the learned trial Court passed the impugned order dated 29.11.2024 below Exh.178 without considering scope of section 311 of the Cr.P.C., and permitted the prosecution to examine the suicide note through the handwriting expert.

5. The learned counsel appearing for the Petitioner further canvassed that, when the document/suicidal note was in custody of the prosecution and produced before the Court, however, nothing has been solicited by the prosecution, to prove said suicidal note of the deceased. However, when the matter is listed for judgment, the prosecution wanted to examine the said suicide note/examine the handwriting expert to prove the suicidal note, which amount to filling up lacuna. Therefore, permitting the prosecution to prove suicidal note at the fag end of trial is not permissible in the eyes of law.

6. In support of this submission, the learned counsel for the Petitioner relied on *Shridhar Waman Surushe Vs.State of*

Maharashtra, 1986 ALL MR OnLine 390, wherein, this Court distinguished the decision of the Apex Court in case of *Jamatraj Kewalji Govani Vs. State of Maharashtra*, AIR 1968 SC 178 and held as under:-

"The Supreme Court in the aforesaid decision in Jamatraj's case has clearly laid down that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly. In my view, looking to the facts of the instant case, the denial of the marriage by accused with applicant cannot be said to be sudden and unexpected. Therefore, the permission granted by the trial Court to recall and reexamine the complainant after the close of the trial is apparently to fill up the gap and this is contrary to the view taken by Supreme Court in this behalf. It has been clearly laid down that the purpose of recalling and re-examination of a witness is not to fill up the gap. It is however to be seen that it depends on the facts of each case as to whether the recalling and re-examination of a witness is with a view to fill up the gap in the evidence of a party who invokes the provision of recalling. Allowing the complainant to re-examine her in the instant case, would clearly amount to permitting her to fill up the gap. A mere look at Exhibit 50 would show that she wanted to prove the contents of a pursis containing conditions of reconciliation. That by itself, even if proved, may not constitute a valid proof for her valid marriage with the applicant. But, by granting permission, it would certainly mean to permit her to fill up the gaps in her prosecution case. I am firmly of the view that the trial Court has clearly committed an error of law in allowing Exhibit 50, by permitting, recalling and re-examination of the complainant."

7. The learned counsel for the Petitioner further relied on the case of *Umesh Nanaji Shinde Vs. Moreshwar Namdeo Raut, 2007 OSupreme (Bom) 977*, wherein it has been held that the complainant therein did not made any allegations, that it was not within his knowledge and therefore he could not examine the witnesses earlier. So also, no explanation was offered as to why the documents were not produced during recording of the evidence. Under these circumstances, the Coordinate Bench of this Court held that, the application for recalling of the witness was filed after the statement of the accused was recorded and there were no allegation that the complainant had recently discovered the said facts. Therefore, the complainant cannot be permitted to fill up the lacuna.

8. Per contra the learned APP canvass that, the Investigation Officer conducted investigation in Crime No. 21 of 2014. During course of investigation, the I.O. seized the suicidal note of the deceased under the panchnama aslongwith other Articles. After completion of investigation a chargesheet came to be filed, All seized Articles including Suicidal Note deposited by the Investigating Officer with Muddemal property with this Court,

however, during course of trial the prosecution did not notice about deposit of suicidal note with muddemal property, hence, said chit could not referred and remained to be proved. Therefore, though the prosecution closed it's evidence and statement of the Accused recorded u/s 313 of Cri. P. C., still the prosecution having right to recall the witness u/s 311 of Cri.P. C. Therefore, merely, the learned trial Court granted permission to the prosecution to prove suicidal note it does not amount to additional evidence or filling of up lacuna. So also, the petitioner accused will have right to cross examine the witness, hence, prayed for dismissal of the petition.

9. Having regard to the rival submission canvassed on behalf of the petitioner and the prosecution, I have gone through the record. In the case in hand, it prima facie appears that, on 04.02.2014, the informant lodged a report and alleged that, her brother Ashok alongwith his wife and daughter committed suicide due to instigation of the accused. Her deceased brother left suicide note. It is matter of record that, during course of investigation, the Investigating Officer seized said suicide note and other articles under the seizure panchnama. After completion of the investigation, the Investigating officer filed charge sheet as against the petitioner/accused and deposited all seized articles with the

Muddemal property before the learned Trial Court.

10. After going through the impugned order, it apparent that, the suicidal note of the deceased Ashok was seized by the Investigation Officer under the seizure panchnama, however, said suicidal note was deposited alongwith other seized articles with Muddemal property and said fact did not notice by the Public prosecution where said suicide note was kept. No doubt, the prosecution filed Exh. 176 Pursis and closed it's evidence. Thereafter, statements of the accused recorded under section 313 of Cr.PC.. Thereafter, the prosecution filed an Application Exh. 178 and prayed for re-call of the witness Hand Writing Expert to prove suicide note. Thereafter the learned Trial Court suo moto initiated enquiry through the Bench clerk to verify, whether the Muddemal is deposited with the Court and whether the suicidal note is part and parcel of the said Muddemal property. And thereafter, it is revealed about finding of seized suicidal note in the Muddemal Property which has already been deposited. Thereafter, the prosecution moved Exh. 178 an application for examination of suicide note through handwriting expert. The learned trial Court passed the impugned order to provide sufficient opportunity to the prosecution to prove suicide note by examining

the Hand Writing Expert for the just decision of the case.

11. Section 311 of Cr. P. C. provides as under:

"311. Power to summon material witness, or examine person present.

- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

12. In *Shailendra Kumar-Vs- State of Bihar, AIR 202 SC 270*, it is held held that, Sec. 311 of Cri. P.C., empowers the Court to summon material witnesses though not summoned as witness and to examine or recall and re-examine, if their evidence appears to it to be essential to the just decision of the case. If there is any negligence, lache or mistake by not examining material witnesses, the Court's function to render just decision by examine such witnesses at any stage is not, in any way, impaired.

13. In *Rajendra Prasad-Vs-Narcotic Cell, Delhi, AIR 1999 SC 2292=(1999) 6 SCC110*, the Hon'ble Apex Court Court held that, lacuna does not mean mistake/laches of the public prosecutor in conducting the case when the public prosecutor had

closed prosecution evidence without ascertaining whether cross examination of witness had been done, petition u/s 311 was allowed for cross examination of the witnesses. Where the public prosecutor did not summon the witnesses and as such the Court closed prosecution evidence, the application filed by the State for summoning the witnesses u/s 311 Cri. P. C. was entertained. Where the public prosecutor had given up witnesses in attendance in Court and the evidence of the witnesses is necessary for the just decision of the case, the Court would summon the witnesses u/s 311 of Cri. P. C.

14. In *Mohanlal Shamji Soni Vs. Union of India, AIR 1991 SC 1346*, the Hon'ble Supreme Court held that, in order to enable the Court to find out the truth and render a just decision the salutary provisions of Sec. 311 of Cr.PC., are enacted where under any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. Opportunity of rebuttal shall be given to the other party.

15. In the case in hand, it is not the case of the Petitioner/accused that the Investigating Officer did not seize the suicidal Note of the deceased from the spot of incident. The record shows that, the Investigating Officer seized said suicidal note from the spot of incident under the seizure panchnama and deposited with other property with the charge sheet in the Muddemal property of the Trial Court. It is not in dispute that, the suicidal note is part of the Muddemal property. However, during course of the trial, neither the Investigating Officer nor the prosecutor noticed about said suicidal note because said suicidal Note was kept with Muddemal Property. Therefore no explanation has been sought from the concerned witness about the suicide note, hence, it remained unproved.

16. Needless to say that, fact of seizure of suicidal Note and it's production on record of the court with Muddemal property, first time noticed by the trial court after the report was called through the Bench Clerk. It is not the case of the Petitioner that, the prosecution is trying to bring a new document i.e. suicidal note for the first time after the evidence is closed but it appears that, due to mistake of the public prosecutor said suicide note remained to be referred to the witness and not proved.

Therefore, if the prosecution is permitted to prove said suicidal note through the Handwriting Expert, no prejudice would cause to the petitioner/accused because he will have right to cross examine the said witnesses. Therefore, considering the scope of Section 311 of the Cr.PC., as well as law laid down in the cited cases, merely permitting the prosecution to prove seized suicidal note does not amount to granting permission to the prosecution to fill up the lacuna.

17. The learned trial Court passed the impugned order and permitted to call the material witness- Handwriting Expert for examination in support of the prosecution case, hence, it does not appear perverse, illegal, bad in law. In view of above discussion, the Criminal Writ Petition is hereby dismissed. No order as to costs.

(Y. G. KHOBRAGADE, J.)

JPChavan